Supreme Court, U.S.
FILED
07-447 SEP 18 2007
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

RIDGEVIEW PARTNERS, LLC.,

Petitioner,

v.

MAUREEN ENTWISTLE, individually and as Chairperson of the Town of Greenville Planning Board, PAUL EWANCIW, SCOTT REED, JOHN KARECKI, ALLEN BOBB, LEO MCCAREY, CYNTHIA EWANCIW MORSE, individually and as Members of the Town of Greenville Planning Board, MICHAEL SUSSMAN, individually and as Special Counsel, THE TOWN OF GREENVILLE PLANNING BOARD, and THE TOWN OF GREENVILLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL H. DONNELLY
DICKOVER DONNELLY DONOVAN & BIAGI, LLP
28 Bruen Place
Goshen, NY 10924

JAMES GERARD SWEENEY
Counsel of Record
One Harriman Square
P.O. Box 806
Goshen, NY 10924
(845) 291-1100

Counsel for Petitioner

QUESTIONS PRESENTED

The First Amendment right to petition the government undergirds the idea of our republican form of government. The Court below held that the right did not obligate government to accept such a petition. The questions presented are:

1. Whether the petition right includes an obligation that a government approval agency must at least accept an application for an administrative permit.

2. Whether the doctrine of unconstitutional conditions prohibits the approval agency from imposing a condition to pay an illegal charge prior to entertaining the application.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or no wholly owned subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

1. BECAUSE OF THE FUNDAMENTAL AND OVERARCHING NATURE OF THE QUESTIONS INVOLVED THE COURT SHOULD GRANT THE WRIT 5

2. RIDGEVIEW'S CLAIM OF UNCONSTITUTIONAL CONDITIONS ADDS REASON TO GRANT THE WRIT 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Dolan v. City or Tigard
512 U.S. 374 (1994) 10

Dougherty v. Town of North Hempstead BZA
282 F.3d 83 (2nd Cir., 2002) 6

Gagliardi v. Village of Pawling
18 F.3d 188 (2nd Cor., 1994) 6

Harman v. Forssennius
380 U.S. 528 (1965) 8

Jewish Reconstructionist Synagogue of North Shore Inc. v. Incorporated Village of Roslyn Harbor
40 N.Y.2d 158 (1976) 3, 10

Lingle v. Chevron
544 U.S. 528 (2005) 10

Monnell v. Department of Social Services
436 U.S. 658 (1978) 9

Ridgeview Partners v. Entwistle
354 F.Supp. 2d 395 (SDNY 2005) 4

Smith v. Arkansas State Highway Employees
441 U.S. 463 (1979) 6, 9

United Mine Workers v. Illinois State Bar Assoc.
389 U.S. 217 (1967) 9

United States v. Crukshank
92 U.S. 542 (1875) 6

WMX Technologies v. Miller
197 F.3d 367 (9th Cir., 1999) 6

Zinermon v. Burch
494 U.S. 113 (1990) 9

* * * * * * *

Constitutional & Statutory Provisions:

42 USC §1983 4

* * * * * * *

Other:

Summers, *Occupational Licensing: Ranking the States and Exploring Alternatives,* Rand Foundation, Los Angeles, CA (August 2007) 7

* * * * * * *

OPINIONS BELOW

The District Court's opinion dismissing the Petitioner's complaint is unreported. It was entered in the District Court on May 17, 2006. It appears in the Appendix at A1-a.

The summary order of the Court of Appeals for the Second Circuit affirming the judgment is also unreported. It was entered in that Court on July 5, 2007. It appears in the Appendix at A12-a.

JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1). The Order of the Court of Appeals for the Second Circuit affirming the judgment of the District Court dismissing the Petitioner's complaint in its entirety was entered in the Circuit Court on July 5, 2007 and is final.

CONSTITUTIONAL PROVISION INVOLVED

The petition right clause of the First Amendment to the Constitution in relevant part provides: "Congress shall make no law. . .abridging the freedom . . .to petition the Government for a redress of grievance."

STATEMENT OF THE CASE

In the summer of 2001 the Petitioner ("RidgeView) sought to apply for approval of a site plan of a residential development in the Town of Greenville located in western Orange County, NY. Once it became known the public voiced its displeasure at the intrusion of the proposal upon the rural character of the Town.

The Respondent Planning Board ("the Board') simply refused to accept the application at all. Instead, it imposed a condition upon its acceptance of the application demanding that RidgeView reimburse it for certain costs (or "fees" as it called them) it had incurred on RidgeView's earlier, and subsequently withdrawn, application for similar relief.[1] One of those "fees" was the legal fee of the Board's special counsel for advising concerning the matter. Others involved "lump sum" undocumented professional costs for an engineer and planner.

---

[1] Six months earlier RidgeView had submitted a similar project, with a different configuration and number of dwelling units, but withdrew it upon the submission of this application. That application had been the subject of a state court mandamus proceeding to compel when the Board deliberately suspended the review process after its initial review.

Years before, the New York Court of Appeals held these type of professional costs were not automatically chargeable to an applicant. They must be documented and detailed so that a determination of reasonableness and legality could be made. Under no circumstances, however, were a board's legal fees to be charged to the applicant.[2]

Anticipating the Board's position RidgeView pointed out the holding in *Village of Roslyn Harbor* to the Board. Such advance warnings made no difference. Upon RidgeView's initial appearance before the Board it immediately adopted a resolution not to accept the application unless the demanded "fees" were paid first, in full as demanded, and without question. RidgeView's consultants protested and were thereupon instructed to leave the boardroom. The Board was unrelenting in its position.[3]

---

[2] See *Jewish Reconstructionist Synagogue of North Shore Inc. v. Incorporated Village of Roslyn Harbor*, 40 N.Y.2d 158 (1976).

[3] Well after the commencement of this action and the joinder of issue the Board did offer to allow the application to proceed upon payment of the fees under protest. RidgeView declined that belated litigation offer of compromise as its market opportunities had diminished by that time.

Thereafter RidgeView commenced this action pursuant to 42 USC §1983 alleging multiple constitutional claims but focusing primarily on its claim that its petition right had been violated.[4]

The District Court denied cross motions for summary judgment holding that whether or not the Board had accepted the application was a question of fact. See *Ridgeview Partners v. Entwistle,* 354 F.Supp. 2d 395 (SDNY 2005). Both sides moved for reconsideration arguing that there was no factual dispute outstanding and whether the application had been accepted was a matter of law to be drawn from the undisputed facts. Thereupon the District Court found, as a matter of law, that the application had been accepted and entertained by the Board, thus, RidgeView's petition right claim failed.[5] It directed the entry of judgment dismissing RidgeView's complaint. See (A1-a).

---

[4] On appeal RidgeView narrowed it claims to three: (1) its petition right had been violated, (2) the demanded "fees" amounted to an unconstitutional condition, and (3) it was irrationally discriminated against as a "class of one" when compared to other applicants who had been allowed to proceed before the Board with similar "fees" unpaid.

[5] The District Court also dismissed all of RidgeView's alternate causes of action.

RidgeView appealed to the Court of Appeals for the Second Circuit. In a summary order dated and entered July 5, 2007 the Second Circuit affirmed the District Court's judgment of dismissal holding that RidgeView had no recourse to the petition clause to begin with because its claim was focused only on the Board's refusal to accept the application rather than the Board's "actions". It concluded that the refusal of a government to consider or entertain a administrative petition is not justiciable under the petition clause. (A12-a).

REASONS FOR GRANTING THE WRIT

1. BECAUSE OF THE FUNDAMENTAL AND OVERARCHING NATURE OF THE QUESTIONS INVOLVED THE COURT SHOULD GRANT THE WRIT

There is no dispute among the circuits or the high courts of the states about the reach of the petition clause. Thus, the traditional reason for granting certiorari is not present. So why then should the Court accept this case for review? The answer lies in a realization that the question posed is fundamental. It affects virtually every person in this nation. What does a citizen's right to petition his government mean? Where does it begin and what is its content?

The Court has not probed the dimensions of the petition right in almost three decades.[6] In the meantime the approval process for administrative permits to develop land has grown enormously complex with sophisticated zoning laws, wetland, storm water and flood plain reviews, sewer and water system reviews, environmental reviews, historical significance reviews and the like each with its own set of governmental approval agencies and associated rules, regulations and laws and, importantly, each requiring separate applications or "petitions" to those arms of government for relief.

Beyond seeking permits to develop land there is a need for governmental permits or permissions of some kind for the most routine of daily activities, e.g. driving a car, getting married, owning a dog or a gun,

---

[6] *Smith v. Arkansas State Highway Employees,* 441 U.S. 463 (1979). In its modern application the courts have held that the right is not limited to the redress of grievances alone but applies to any activity involving the power and duty of government including the request for administrative relief. See *United States v. Crukshank,* 92 U.S. 542, 552 (1875); *Gagliardi v. Village of Pawling,* 18 F.3d 188 (2nd Cor., 1994) and *Dougherty v. Town of North Hempstead BZA*, 282 F.3d 83, 91 (2nd Cir., 2002). One circuit, however, has held that the right is limited to associational or protected public speech activities and does not include commercial profit oriented activities. See *WMX Technologies v. Miller,* 197 F.3d 367, 372-373 (9th Cir., 1999). No other circuit has so constrained the right.

being a lawyer, doctor, public school teacher or even a barber or beekeeper, advertising on public streets, selling hotdogs at a roadside stand, being a notary public and so on, activities that affect almost every facet of our daily lives in some way or another. Each of these activities involves an application, or "petition", of some sort to a unit of government for approval. We are a thoroughly regulated society. We must petition or apply to our government for the privilege to conduct the most mundane of our activities and, for a great many of us, for the privilege to pursue our livelihood.[7]

If a government agency can merely thumb its nose at an applicant refusing to accept his or her application, or "petition", until a so called "fee", long ago declared illegal by the state's highest court, is paid first and thereafter can escape standing before a federal court to account for that refusal, that person's right to petition his government becomes meaningless.

This question couldn't be more fundamental. Indeed, it almost seems too pedestrian. Yet, it is anything but. The issue at hand affects almost

---

[7] See Summers, *Occupational Licensing: Ranking the States and Exploring Alternatives,* Rand Foundation, Los Angeles, CA (August 2007) for a thorough analysis of the occupational licensing requirements in the fifty states.

everybody. If such an applicant or petitioner, be it a homeowner seeking a routine building permit, or a couple desiring to get married, or a barber trying to practice his trade, or a developer such as RidgeView, cannot approach his government to simply seek such permission without being met with a demand to pay an illegal "fee" and, if so thwarted, he cannot thereafter present his claim of a denial of his petition right to the federal courts it begs the question of what the petition right means and what the federal courts are for.[8]

In this age of administrative entanglement with every phase of daily life what is the content of a citizen's right apply to, or "petition", his government? Does not the Constitution afford him the right to reach out to a federal court and claim a constitutional foul by reason of the illegal fee demand and should not the federal courts accept that complaint? [9] The Second

---

[8] The importance of this question should not be diminished by the amount of the illegal demand. Whether it is $2,500.00 as here or $250,000.00 should make no difference. The trivial amount demanded in the renowned poll tax case (*Harman v. Forssennius*, 380 U.S. 528 (1965)) at $1.50 per voter illustrates that truth. The ability to reach one of the most important clauses in the Bill of Rights is at issue, not the amount of money demanded by the Board to exercise that right.

[9] Years ago the Court held that it is no response to a

(continued...)

Circuit said no. It said that the petition right did not reach down to a request for action by government agencies but, rather, was confined only to "their actions".[10] If that be so a citizen's right to petition his government, long recognized by this Court as one of the "most precious" rights in our democracy (*United Mine Workers v. Illinois State Bar Assoc.*, 389 U.S. 217, 222(1967)) is in danger of becoming an empty shibboleth, a quiver without arrows.

That is why this Court should review this case.

---

[9] (...continued)
constitutional violation of this sort to say that there is a perfectly adequate state court remedy available, i.e. here a common law mandamus proceeding to compel the review of the application. Constitutional guarantees do not depend on state court remedies. See *Monnell v. Department of Social Services,* 436 U.S. 658 (1978)) ["It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplemental to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."]. To the same effect see *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

[10] No court has gone that far. This Court, in *Smith v. Arkansas State Highway Employees,* 441 U.S. 463, 465, has said that the First Amendment imposes no obligation upon government "to listen or respond" to a petitioner. However, here, RidgeView never even got the chance to speak - and that is the point.

2. RIDGEVIEW'S CLAIM OF UNCONSTITUTIONAL CONDITIONS ADDS REASON TO GRANT THE WRIT

The doctrine of unconstitutional conditions holds that government may not "penalize" the exercise of a constitutional right by imposing some irrational or illegal burden upon its exercise. See *Woodard v. Ohio Adult Parole Authority,* 107 F.3d 1178, 1190 (6th Cir., 1997). Calling the doctrine "well settled", the Court has employed it in the case of an owner's application for a land use permit. See *Dolan v. City or Tigard,* 512 U.S. 374, 385 (1994) and *Lingle v. Chevron,* 544 U.S. 528, 547 (2005). RidgeView invoked the doctrine in the current circumstances.

It is beyond question that the Board explicitly conditioned RidgeView's right to even approach it upon the payment of its special counsel's legal fee. As pointed out *Roslyn Harbor* (at 40 N.Y.2d 158) makes it clear that a New York land use agency's legal fees may not be charged to an applicant. It is a cost that the agency must absorb itself. As such the charge here became a penalty imposed upon the citizen's fundamental right to petition its government. RidgeView's right to petition the government and access its services would be of little value if the right could be indirectly denied by the Board's imposition of a condition to pay an illegal fee first. Such a condition would manipulate the right out of existence.

Being fundamental and inexorably connected to the petition right question presented to the Court the element of unconstitutional conditions, which was not addressed by the Second Circuit precisely for that reason, adds strength to the Petitioner's request for review.

CONCLUSION

Because of the fundamental question involved, i.e. what is the content of a citizen's right to petition the government; because that question affects almost everybody in the administratively regulated world we have come to live in and because the Court has not probed the dimensions of the petition right for almost three decades it is urged that certiorari be granted to allow the Court to answer the very important questions raised by this case, i.e. where does that right begin.

Respectfully submitted,

James Gerard Sweeney
Attorney for Petitioner
One Harriman Square
P.O. Box 806
Goshen, New York 10924
Tel. (845) 291-1100

Michael H. Donnelly, *Of Counsel*

APPENDIX

Decision and Order of the U.S. District Court entered on May 17, 2006 . . . . . 1-a

Decision and Order of the U.S. Court of Appeals for the Second Circuit entered on July 5, 2007 reported at 227 Fed.Appx. 80 . . . . . 12-a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RIDGEVIEW PARTNERS, LLC,

Plaintiff,

v.

MAUREEN ENTWISTLE, individually and as Chairperson of the Town of Greenville Planning Board, PAUL EWANCIW, SCOTT REED, JOHN KARECKI, ALLEN BOBB, LEO McCAREY, CYNTHIA EWANCIW MORSE, individually and as Members of the Town of Greenville Planning Board, MICHAEL SUSSMAN, individually and as Special Counsel, THE TOWN OF GREENVILLE PLANNING BOARD, and THE TOWN OF GREENVILLE,

Defendants.

---

01 Civ. 10248 (SCR)

Memorandum Decision and Order

Stephen C. Robinson, United States District Judge:

Ridgeview Partners LLC ("Plaintiff"), a development company, brought this case against the Town of Greenville Planning Board, its members[1] the Town of

---

[1] The members of the Town of Greenville Planning Board include: Maureen Entwistle, Paul Ewanciw, Scott Reed, John Karecki, Allen Bobb, Leo McCarey, and Cynthia Ewanciw Morse. The members were sued individually and as members

Greenville (collectively "the Planning Board"), and Michael Sussman ("Sussman") (collectively "Defendants"). Plaintiff's claims arise out of a dispute over Plaintiff's application for a housing development and the Planning Board's response to that application. Both Plaintiff and Defendants have filed motions for reconsideration. Upon reconsidering this Court's January 27, 2005 decision, we now find there is no genuine issue of material fact. Therefore, Plaintiff's motion for partial summary judgment on the issue of liability is denied, the Planning Board's cross motion for summary judgment is granted, and Sussman's motion for summary judgment is granted.

I. Background

On January 27, 2005, this Court denied Plaintiff's motion for partial summary judgment on the issue of liability, denied Plaintiff's motion to strike the individual defendants' immunity defense, and denied Plaintiff's motion in limine to preclude the duty to mitigate defense. This Court also denied the Planning Board's cross motion for summary judgment, denied the Planning Board's motion in limine to preclude Plaintiff's expert witness testimony and evidence at trial, but reserved judgment on the Planning Board's duty to mitigate damages defense. Finally, this Court granted Sussman's cross motion for summary judgment on the First Amendment retaliation claim, but denied the remaining claims and reserved judgment on the qualified immunity defense. Familiarity with that opinion and the relevant facts is presumed.

---

of the Planning Board.

Both Plaintiff and The Planning Board filed now move for reconsideration pursuant to Local Civil Rules 6.3, 6.4, and 7.1. Plaintiff has also moved, in the alternative, for permission to appeal.

II. Discussion

A. Standard of Review

Local Civil Rule 6.3 requires that a motion for reconsideration set forth "the matters or controlling decisions which counsel believes the court has overlooked." The standard for granting a motion for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked - matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Schrader v. CSX Transp.*, 70 F.3d 255, 257 (2d Cir. 1995). In addition, a party may not advance new facts, issues or arguments not previously presented to the court. See *Morgan Guar.Trust Co. v. Garrett Corp.*, 625 F.Supp. 752, 756 (S.D.N.Y. 1986) ("A request for reargument is not an occasion to reassert arguments previously raised, but dismissed by the court.")

Thus, for this Court to reconsider its January 27, 2005 Decision and Order, the Plaintiff must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion. *See Shamis v. Ambassador Factors Corp.*, 187 F.R.D. 148, 151 (S.D.N.Y. 1999). *See also Shrader, 70 F.3d* at 257; *Doe v. New York City Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983) (a motion for reconsideration may be granted to "correct a clear error or prevent manifest injustice"). Unless these "overlooked" matters "might reasonably be expected to alter the

conclusion reached by the Court," *Shrader*, 70 F.3d at 257, the motion must be denied. *See Vogel v. State University of New York at Stony Brook*, 00-1129, 2005 WL 3533147, at *1 (E.D.N.Y. Dec. 19, 2005).

B. Discussion

This Court finds the existence of the necessary circumstances to revisit its January 27, 2005 Order. In that Order, this Court found that the question of whether the Planning Board received Plaintiff's second application was issue of fact for a jury. Upon reconsideration, this Court now finds that, as a matter of law, the Planning Board received Plaintiff's second application.

When the Planning Board's engineer received and began reviewing Plaintiff's second application, it was as if the Planning Board itself received the application. The engineer had previously received and reviewed Plaintiff's first application. Based on prior practice, it was reasonable for the engineer to believe he had the authority to receive Ridgeview's second application and then begin reviewing it. The Planning Board did not have to give any instructions for him to begin his review. Further, it was reasonable for Plaintiff to believe its application had been received when it delivered the application to the Planning Board's engineer. The subsequent decision by the Planning Board to stop reviewing the application until Plaintiff paid its outstanding fees is not equivalent to a decision not to accept the application. In fact, by its very nature, the Planning Board's decision to *stop* reviewing the application means that the application had been received and a review commenced.

As a result, that is no genuine issue of material fact, and, therefore, Plaintiff's motion for partial summary judgment on the issue of liability is denied, the Planning Board's summary judgment motion is granted, and Sussman's summary judgment motion is granted. This Court will address Plaintiff's four outstanding claims against the Planning Board and its outstanding claims against Sussman in turn.

1. The Planning Board's Motion
   a. First Amendment Right to Petition the Government

Plaintiff first argues that the Planning Board denied Plaintiff's First Amendment right to petition the government when it refused to receive and process Plaintiff's second application because Plaintiff did not pay certain costs. This Court finds that the Planning Board did not violate Plaintiff's First Amendment right when it refused to continue processing Plaintiff's second application.

As noted above, the Planning Board received Plaintiff's second application. Once the application was received by the engineer, the Planning Board's attorney made clear to Plaintiff that the Planning Board would not continue the review process until Plaintiff paid "reasonably incurred expenses for professional services" that the Planning board incurred processing Plaintiff's first application. Plaintiff had previously agreed to pay such expenses, which amounted to $2,900.[2] (Pl.'s Opp. Mem. At 9.) According to the New York Court of Ap-

[2] Compared to the cost of Plaintiff's project an the cost to process an application for a project of this size and magnitude, the costs The Planning Board imposed were eminently reasonable.

peals, a planning board can require an applicant to pay reasonable fees before the planning board will give final approval to an application. *See Coates v. Planning Board of Village of Bayville*, 58 N.Y.2d 800 (1983) (finding that the Planning Board of Bayville could impose engineering, legal, and clerical fees upon the petitioners as a condition for final approval of their application because the petitioner could not show that the fees were unnecessary or that the Board acted arbitrarily or capriciously). Thus, the Planning Board's demand that Plaintiff pay reasonable expenses incurred during the review of its first application before the Planning Board would continue to process Plaintiff's second application was not a violation of Plaintiff's First Amendment right to petition the government.

b. Retaliation

Plaintiff next argues that the Planning Board refused to receive its second application in retaliation for Plaintiff's decision to commence and maintain an Article 78 proceeding, and that this retaliation violated Plaintiff's First Amendment rights to free speech and to petition the government.

This Court's finding that the Planning Board received the second application and began processing it undercuts Plaintiff's claim that the Planning Board refused to process Plaintiff's application in retaliation for the Article 78 proceeding. Because the Planning Board received and began to process Plaintiff's application, Plaintiff does not have a basis for its claim of retaliation.

Even if this Court were to find that the Planning Board refused to receive the second application, Plaintiff's retaliation claim would fail. A defendant is entitled

to prevail on summary judgment by establishing that the alleged retaliatory actions would have taken place in the absence of the protected activity. *Davidson v. Chestnut*, 193 F.3d 144, 149 (2d. Cir. 1999). The Planning Board had made clear that they would have processed the application if Plaintiff had paid the reasonable fees it had agreed to. Plaintiff's failure to pay reasonable fees to the Planning Board is a sufficient justification for the Planning Board's actions. Therefore, the Planning Board's summary judgment motion with respect to Plaintiff's retaliation claim is granted.

c. Equal Protection

Plaintiff claims the Planning Board did not proceed on its second application but did proceed with other applications with delinquent escrow accounts. Plaintiff argues that this was a violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiff's claim is without merit.

In *FSK Drug Corp. v. Perales*, the Second Circuit set forth the factors that a plaintiff must show to establish an Equal Protection claim in a selective enforcement case. He or she must demonstrate that:

(1) the person, compared with others similarly situated, was selectively treated, and
(2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person.

FSK Drug Corp. v. Perales, 960 F.2d 6, 10 (2d Cir. 1992).

In reviewing the record and considering the evidence in the light most favorable to Plaintiff, we conclude that Plaintiff failed to establish an equal protection violation. Plaintiff fails to proffer specific evidence of a similarly situated entity that received different treatment from the Planning Board. Plaintiff has failed to identify another entity's project with the complexity and magnitude of Plaintiff's project. Therefore, there is not a "similarly situated" entity that has received preferential treatment. Furthermore, there is also no evidence suggesting that the Planning Board acted with malice or bad faith. As discussed above, the Planning Board's decision to adjourn the processing of Plaintiff's second application until Plaintiff paid the fees from its first application was reasonable. It follows that the Planning Board's treatment of Plaintiff does not satisfy the second prong of *FSK Drug Corp.* test. Therefore, Plaintiff cannot establish its Equal Protection claim.

4. Substantive Due Process

Plaintiff also claims that the Planning Board imposed an impermissible unconstitutional condition on the exercise of its power and, as such, violated Plaintiff's right to substantive due process. Plaintiff, however, has not provided sufficient evidence to sustain a substantive due process claim.

In the words of the Second Circuit:

> Substantive due process is an outer limit on the legitimacy of governmental action. It does not forbid governmental actions that might fairly be deemed arbitrary or capricious and for that

> reason correctable in a state of court lawsuit seeking review of administrative action. Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.

Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999). Thus, "to establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Pena v. DePrisco*, 432 F.3d 98, 112 (2d Cir. 2005) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). Plaintiff has not even alleged that the Planning Board's actions "shock the contemporary conscience", let alone offered any facts to support such an allegation. The Planning Board's motion is granted as to Plaintiff's substantive due process claim.

2. Sussman's Motion

This Court previously ruled that Sussman did not retaliate against Plaintiff but declined to rule on whether Sussman violated Plaintiff's Equal Protection rights or its right to Procedural Due Process. For the following reasons, Defendant Sussman's motion for summary judgment is granted with respect to Plaintiff's Equal Protection and Due Process claims.

a. Equal Protection

As discussed above, to establish an equal protection claim, a plaintiff must show that he or she was "selectively treated" when compared with others who are

similarly situated, and that "selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person." *FSK Drug Corp.*, 960 F.2d at 10.

Sussman did not violate Plaintiff's Equal Protection rights when he conveyed the message to Plaintiff that the Planning Board would not continue processing its second application before the Planning Board received the reimbursement costs promised to it. Sussman was hired by the Planning Board solely to deal with Plaintiff. Sussman had no history of interaction with any other project in front of the Planning Board, and, therefore, could not have treated Plaintiff differently from other, similarly situated entities. Furthermore, there is no evidence that any of Sussman's actions were motivated by malice, bad faith, or discrimination. Because Plaintiff did not establish any of the requisite elements of an Equal Protection claim, summary judgment in favor of Sussman is appropriate. *See Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d. Cir. 1997).

b. Procedural Due Process

Plaintiff's claim that Sussman violated its procedural due process rights is also without merit.

Plaintiff argues that when read together, Sections 45-6, 205-68 and 205-69[A] of the Code of the Town of Greenville and Section 274 of the New York Town Law create a minimal statutory duty on the Planning Board to receive and process an application for site plan approval on its own merits to a point of approval or denial of such application. According to Plaintiff, this

duty established that its property right was violated by Sussman when the Planning Board refused to receive and process its second application for site plan approval on its own merits. Because the Planning Board received the application and then refused to continue processing for a legally justifiable reason, *see Coates*, 58 N.Y. 2d 800, Plaintiff cannot establish that Sussman violated its procedural due process rights.

Therefore, Sussman's motion for summary judgment on Plaintiff's procedural due process claim is granted.

III. Conclusion

This Court grants Defendant's motion to reconsider. Plaintiff's motion for summary judgment is denied. The Planning Board's motion for summary judgment is granted. Sussman's motion for summary judgment is granted. The Clerk of the Court is directed to close this case.

It is so ordered.

S/
Stephen C. Robinson, USDJ

Dated: White Plains, New York
May 17, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIDGEVIEW PARTNERS, LLC

Plaintiff-Counter-Defendant-Appellant,

v.

MAUREEN ENTWISTLE, individually and as Chairperson of the Town of Greenville Planning Board, Paul Ewanciw, individually and as Chairperson of the Town of Greenville Planning Board, Scott Reed, individually and as Chairperson of the Town of Greenville Planning Board, John Karecki, individually and as Chairperson of the Town of Greenville Planning Board, Allen Bobb, individually and as Chairperson of the Town of Greenville Planning Board, Leo McCarey, individually and as Chairperson of the Town of Greenville Planning Board and Cynthia Ewanciw Morse, individually and as members of the Town of Greenville Planning Board, Defendants-Appellees, Michael Sussman, individually and as Special Counsel, Defendant-Counter-Claimant-Appellee, Mark Fellenzer, individually and as Consulting Engineer, Defendant-Cross-Claimant-Appellee, The Town of Greenville Planning Board and Town of Greenville, Defendants-Cross-Defendants-Appellees, Jessica Gardner and Times Herald Record, Movants.

No. 06-3408-cv.

July 5, 2007

Appeal from a judgment of the United States District Court for the Southern District of New York (Stephen C. Robinson, Judge).
UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

James G. Sweeney (Michael H. Donnelly, on the brief), James G. Sweeney, P.C., Goshen, NY, for Appellant.
Cynthia Dolan, Boeggeman, George, Hodges & Corde, P.C., White Plains, NY, for Maureen Entwistle, Paul Ewanciw, Scott Reed, John Karecki, Allen Bobb, Leo McCarey, Cynthia Ewanciw Morse, the Town of Greenville Planning Board, and Town of Greenville.
Michael Sussman, Law Offices of Michael Sussman, Goshen, NY, pro se, for Appellees.

PRESENT: JOSÉ A. CABRANES, REENA RAGGI, Circuit Judges, EDWARD R. KORMAN,[FN*] District Judge.

FN* The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

SUMMARY ORDER

**1 Appellant appeals from a May 18, 2006 judgment of the District Court granting appellees' motions for summary judgment and dismissing a variety of claims brought by appellant under 42 U.S.C. § 1983. Appellant maintains three claims on appeal: (1) appellees violated appellants' First Amendment right to petition the government for redress of grievances by refusing to entertain a site-plan application, (2) such conduct violated appellant's right to equal protection as a "class of one" under *Village of Willowbrook v. Olech*, 528 U.S.

562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), and (3) the payment of the fees in question was an unconstitutional condition imposed on appellant's right to petition the government for redress of grievances. We assume the parties' familiarity with the facts and procedural history of the case.

Upon careful review of the record, the submissions to this Court, and the relevant case law, we conclude that appellant's claims fail as a matter of law. Appellant's claim that appellees have violated its right to petition the government for redress of grievances is legally insufficient because appellant's site-plan application does not purport "to complain to public officials [or] to seek administrative [or] judicial relief from their actions." *Dougherty v. Town of North Hempstead BZA*, 282 F.3d 83, 91 (2d Cir.2002). Rather, it was appellees' refusal to entertain the application that created the grievance of which appellant subsequently sought redress before our Court. In any event, we regard appellant's First Amendment claim as, at most, alleging that appellees "refuse[d] to consider or act upon grievances"-conduct that does not violate the First Amendment. *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979); *see also Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 283-88, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984). Because-as appellant's counsel conceded at oral argument before our Court-appellant's other claims "flow from" the petition claim, appellant's equal protection and unconstitutional conditions claims are likewise meritless.

The judgment of the District Court is AFFIRMED.

71

No. 07-447

FILED

OCT 19 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The (2)

Supreme Court of The United States

RIDGEVIEW PARTNERS, LLC.,

Petitioner,

v.

MAUREEN ENTWISTLE, individually and as Chairperson of the Town of Greenville Planning Board, PAUL EWANCIW, SCOTT REED, JOHN KARECKI, ALLEN BOBB, LEO MCCAREY, CYNTHIA EWANCIW MORSE, individually and as Members of the Town of Greenville Planning Board, MICHAEL SUSSMAN, individually and as Special Counsel, THE TOWN OF GREENVILLE PLANNING BOARD and THE TOWN OF GREENVILLE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

GEORGE S. HODGES
HODGES WALSH & SLATER, LLP
Attorneys for Respondents
75 South Broadway, Suite 415
White Plains, New York 10601
(914) 304-4333

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (13096)

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents, the Town of Greenville, its Planning Board and the members thereof, state that they have no parent companies or no wholly owned subsidiaries.

TABLE OF CONTENTS

Rule 29.6 Statement 1

Table of Authorities 2

Objections to Questions Presented 3

Statement of the Case 4

Objections to Granting the Writ.....5

Conclusion.....7

TABLE OF AUTHORITIES

Dougherty v. Town of North Hempstead BZA,
282 F.3d 83 (2d Cir. 2002).....3

Jewish Reconstructionist Synagogue of North Shore Inc. v. Incorporated Village of Roslyn Harbor,
40 NY2d 158 (1976) 3

Coates v. Planning Board of Village of Bayville,
58 NY2d 800 (1983).....3

OBJECTIONS TO QUESTIONS PRESENTED

Question 1:

Petitioner misstates the holding of the Second Circuit Court of Appeals in raising its first question. The Second Circuit held that the Petitioner's claim that the Respondents' actions violated Petitioner's right to petition government for redress of grievances was legally insufficient because the site plan application does not purport "to complain to public officials [or] to seek administrative [or] judicial relief from their actions." Dougherty v. Town of North Hempstead BZA, 282 F.3d 83, 91 (2d Cir. 2002). (Appendix 14-a).

Thus, the court held that the petition set forth, an application for site plan approval, was not the type of petition that invokes First Amendment protection, and the Petitioner cannot refer this Court to any cases which have so held.

Question 2:

Petitioner's second question incorrectly presumes that fees charged to an applicant for an agency's technical consultant review of the proposed site plan are "illegal." Indeed, it is well settled that such expenses, including legal fees, are permissible, if reasonable, where the applicant seeks a benefit such as site plan approval or a building permit. Jewish Reconstructionist Synagogue of North Shore Inc. v. Incorporated Village of Roslyn Harbor, 40 NY2d 158, 162 (1976); Coates v. Planning Board of Village of Bayville, 58 NY2d 800 (1983)(finding that the Planning Board could impose legal, engineering and clerical fees upon the petitioners as a condition for final approval of their application

because petitioner's could not show that the fees were unnecessary or that the Board acted arbitrarily).

Even if the Court were to consider Petitioner's limited question, whether "a government approval agency must at least accept an application" for a site plan approval, the District Court found, and Petitioner's have failed to refute, that the Respondents accepted and conducted a review of Petitioner's first and second applications.

STATEMENT OF THE CASE

On January 24, 2001, Petitioner filed its first application to construct 1,524 townhouse units in the Town of Greenville.

Petitioner's agreed to pay reasonable fees associated with the review of their application.

The Planning Board discussed the application on March 12, 2001, and set April 25, 2001 as the date for a Public Hearing. The Planning Board also held a workshop meeting on March 26, 2001 at which their counsel and engineer, after review, briefed them on the project.

The Public Hearing was not held because the Town had neither accepted a complete draft environmental impact study nor issued a negative declaration as required under the New York State Environmental Quality Review Act.

Petitioner filed a New York State court proceeding under New York Civil Practice Law and Rules Article 78 alleging that the Planning Board acted in an arbitrary and capricious manner in the review of its application.[1] No order

---

[1] See also Siegel, David D., New York Practice, § 557, et seq. (West 4th Edition 2005)("The Article 78 proceeding supersedes the common law writs of mandamus, prohibition and certiorari to review, supplying in replacement of all three of them a uniform device for challenging the activities of an administrative agency in court.").

discontinuing or withdrawing the Article 78 Petition was ever submitted.

On July 2, 2001, Petitioner announced that it was withdrawing its first application, and simultaneously delivered a second application for 2,081 condominium units on the same property to the Town Engineer.

The Town Engineer received, and began to review the application without any instruction from the Planning Board as was his past practice.

On legal advice, the Planning Board subsequently decided not to proceed with review of the second application until Petitioner had paid the outstanding expenses due on the review of the first application, totaling $2,900.2

On July 23, 2001, Petitioner was advised, that upon payment of these incurred expenses, the Planning Board would proceed with its review of the second, revised application at its August 20, 2001 meeting.

OBJECTIONS TO GRANTING THE WRIT

The District Court properly granted Respondents' motion for summary judgment, and the Second Circuit correctly affirmed the District Court.

As set forth above, Petitioner misinterprets the Second Circuit's holding and seeks to assert a right where none exists. That court held that the Petitioner's claim that the Respondents' actions violated Petitioner's right to petition government for redress of grievances was legally insufficient because the site plan application did not purport "to complain to public officials [or] to seek administrative [or] judicial relief from their actions." (Appendix 14-a).

Thus, the court held that the petition set forth, an application for site plan approval, was not the type of petition

---

2 The expenses incurred included legal counsel - $1,500; engineer - $1,000; and planner - $400, totaling $2,900. (Appendix 5-a).

that invokes First Amendment protection, and the Petitioner cannot refer this Court to any cases which have so held.

Even if the Court were to consider Petitioner's limited question, whether "a government approval agency must at least accept an application" for a site plan approval, the District Court found, and Petitioner's have failed to refute, that the Respondents accepted and conducted a review of Petitioner's first and second applications.

Petitioner's argument incorrectly presumes that fees charged to an applicant for an agency's technical consultant review of the proposed site plan are "illegal." Indeed, it is well settled that such expenses, including legal fees, are permissible, if reasonable, where the applicant seeks a benefit such as site plan approval or a building permit. Coates, supra (finding that the Planning Board could impose legal, engineering and clerical fees upon the petitioners as a condition for final approval of their application because petitioner's could not show that the fees were unnecessary or that the Board acted arbitrarily).

Petitioner's reliance on Roslyn Harbor, supra is misplaced because there is an important distinction between a Planning Board, the administrative agency involved in this matter, and a Zoning Board of Appeals, the agency at issue in Roslyn Harbor. There, the New York Court of Appeals held that a Zoning Board of Appeals, a quasi-judicial agency, may not pass along the legal costs of its review because the applicant was seeking relief from an overly restrictive ordinance. Supra .

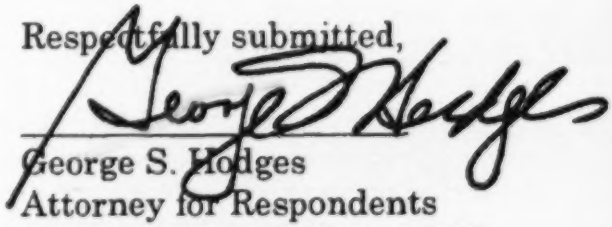
On the contrary, the court held that reasonable legal fees are permissible where the applicant is seeking a benefit, such as the discretionary approval of an application by a Planning Board. Id.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Court must deny the writ for certiorari. Petitioner has misread the Second Circuit's opinion, and misstates the law, in arguing that their application for a Planning Board approval invoked the protection of the First Amendment. Furthermore, it is well settled that a Planning Board may impose legal, engineering and clerical fees upon the petitioners as a condition for final approval of their application unless the petitioner's show, in a New York State action, that the Board acted arbitrarily.

Dated: October 12, 2007

Respectfully submitted,



George S. Hodges
Attorney for Respondents
Hodges Walsh & Slater, LLP
75 S. Broadway, Suite 415
White Plains, New York 10601
(914) 304-4333

Statement Pursuant to Rule 33 (1)(g)

I, George S. Hodges, attorney for the Respondents herein, hereby certify pursuant to Rule 33 (1)(g) of the Rules of the Supreme Court that the foregoing brief in opposition contains 1,198 words.

Dated: October 19, 2007

S/ Geo S Hodges

George S. Hodges